### BEFORE THE EMPLOYMENT APPEAL BOARD Lucas State Office Building Fourth floor Des Moines, Iowa 50319

JACK L WHITCHELO	
Claimant	: HEARING NUMBER: 17BUI-09233
and	EMPLOYMENT APPEAL BOARD
HAWKEYE COMMUNITY COLLEGE	
Employer	

**SECTION:** 10A.601 Employment Appeal Board Review

# DECISION

### FINDINGS OF FACT:

A hearing in the above matter was held September 27, 2017. The administrative law judge's decision was issued September 28, 2017. The administrative law judge's decision has been appealed to the Employment Appeal Board. The Board finds that the notice of hearing was inadequate to give the parties notice of the issues which were adjudicated by the Administrative Law Judge's decision.

### **REASONING AND CONCLUSIONS OF LAW:**

Iowa Code section 10A.601(4) (2017) provides:

5. Appeal board review. The appeal board may on its own motion affirm, modify, or set aside any decision of an administrative law judge on the basis of the evidence previously submitted in such case, or direct the taking of additional evidence, or may permit any of the parties to such decision to initiate further appeals before it. The appeal board shall permit such further appeal by any of the parties interested in a decision of an administrative law judge and by the representative whose decision has been overruled or modified by the administrative law judge. The appeal board shall review the case pursuant to rules adopted by the appeal board. The appeal board shall promptly notify the interested parties of its findings and decision.

The Notice of Hearing in this case did not include the issue of reasonable assurance, but only the general issue of availability. The parties did not waive notice at the hearing. Now generally, "[i]f new issues appear, different from those which are noticed in the appeal, the board ...in the interest of prompt administration of justice and without prejudicing the substantive rights of any party, may hear and decide any issue material to the appeal, even if not specifically indicated as a ground for appeal or not noticed for the administrative hearing." 486 IAC 3.1(6). Thus the fact that an issue is not raised does not necessarily preclude consideration of that issue at a later

stage of the proceedings so long as due process is satisfied. Id.; Swanson v. Employment Appeal Board, 554 N.W.2d 294, 297 (Iowa App. 1996); Kehde v. Iowa Dept. of Job Service, 318 N.W.2d 202, 206 (Iowa 1982); Flesher v. Iowa Dept. of Job Service, 372 N.W.2d 230, 233 (Iowa 1985). Despite this, however, due process does require some notice to the parties of what issues are to be decided. For example, notice of a disgualification based on a discharge is not adequate notice that the issue of disgualification based on a guit will be adjudicated. Silva v. Employment Appeal Bd. 547 N.W.2d 232 (Iowa App. 1996); Iowa Code § 17A.12(2)(c) and (d). Here, the notice cited §96.4(3) which is availability but the Administrative Law Judge seemed to dispose of the case on §96.4(5) dealing with reasonable assurance. We note that in Silva the Court found a rule considering guit and terminations to be the single issue of "separation" was inadequate notice. Just so we do not think availability and reasonable assurance, two very different issues, can subsumed under the single issue of "able and available." Moreover, the testimony on reasonable assurance was sparse. Further, we note that the question of reasonable assurance applies only during certain specified periods of time, e.g., between academic years. We thus would need evidence on when the break between academic years, and academic terms occurs at the Employer. Of course, we also note that the general rule is that a "Week of total unemployment" is defined to be "[a] week in which an individual performs no work and earns no wages" and is not tied to merely being listed on payroll as an employee. A remand for an additional hearing is therefore mandatory so that the parties can address the issue of reasonable assurance.

## **DECISION:**

The decision of the administrative law judge dated September 28, 2017 is not vacated at this time, and remains in force unless and until the Department makes a differing determination pursuant to this remand. This matter is remanded to an administrative law judge in the Workforce Development Center, Appeals Bureau. The administrative law judge shall conduct a new hearing following due notice. After the hearing, the administrative law judge shall issue a decision that provides the parties appeal rights.

Kim D. Schmett

Ashley R. Koopmans

James M. Strohman